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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 315

FRED A. CHAPMAN AND ELISE CHAPMAN,
PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court wrote no opinion. The opinion of the court of appeals (R. 451-456) is reported at 169 F. 2d 641.

JURISDICTION

The judgment of the court of appeals sought to be reviewed was entered August 9, 1948 (R. 456-457). Petition for rehearing was denied August 30, 1948 (R. 458-459). The petition for a writ of certiorari

was filed September 27, 1948. The jurisdiction of this Court is invoked under 28 U. S. C., sec. 1254(1).

QUESTIONS PRESENTED

Whether the court of appeals erred in affirming the judgment of the district court awarding just compensation for property taken in eminent domain, in view of the action of the district court:

1. In limiting the number of expert valuation witnesses;

2. In explaining to the jury a reference made to petitioners' withdrawal of estimated just compensation deposited in court with the declaration of taking, and instructing them to disregard it in fixing compensation;

3. In admitting and excluding various items of evidence as to income from the land, the number of cattle run on the land, and prices paid for parts of the land at various times;

4. In holding that one of the Government's witnesses had sufficient acquaintance with the land to permit him to testify as to its value; and

5. In commenting on the relative weight of evidence as to the productivity of the land at remote, as compared with recent, times.

STATEMENT

On October 17, 1944, the United States filed its petition to condemn for the Denison Dam Project 3,591.73 acres of land in eastern Oklahoma (R. 2-9).

On October 21, 1944, a declaration of taking was filed, accompanied by deposit of $144,250 as estimated just compensation, and judgment was entered thereon (R. 9-14). Commissioners appraised the land at $134,689 (R. 15-17), following which petitioners demanded a jury trial (R. 18-19) and withdrew the sum of $143,433.90 remaining in court after distribution of $816.10 to a mortgagee (R. 17, 19). The trial resulted in a judgment which was reversed by the circuit court of appeals. *United States* v. *Chapman,* 158 F. 2d 417. A second trial was had April 21 to 23, 1947 (R. 47-229).

After inquiring at pre-trial conference as to valuation testimony intended to be introduced, the judge tentatively limited the number of valuation experts on each side to four (R. 29-31, 38-42, 47-48). Exception was allowed and offer of further proof was invited (R. 41, 48), but neither side offered more than four valuation experts, nor did petitioners suggest any reason why they might need more (R. 29-30).

At the beginning of the trial the court indicated that, the parties being willing, objections would be deemed to be made on all available grounds (R. 48).

For petitioners, Mr. Chapman described the land and its uses (R. 53-65), testifying to large numbers of cattle run and wintered on it (R. 56). On cross-examination the United States introduced his personal property tax declarations showing a substantially smaller number of cattle declared by him (R.

66-72, 171, 175-176, 243-256, 446-449). Petitioners' objection was overruled and the jury instructed to consider the tax lists only as evidence of the number of cattle on the land (R. 69, 71, 155). Mr. Chapman was required on cross-examination to state prices paid by him for various parts of the land, despite petitioners' objection that sales in 1936 and earlier were too remote (R. 72-74, 151-153, 171-175, 176-178). Also over objection, he was asked whether his use of the land had been profitable. He testified that he was putting the land to its best use (R. 76), and that he had received no net profit but had made profits of several hundred thousand dollars used to pay off obligations and to re-invest in the property (R. 78-80, 162-167). To impeach that testimony the United States introduced his personal income tax returns, which the court afterward instructed the jury to disregard except as they might show the number of cattle on the land (R. 80, 169-170, 227). During examination of Mr. Chapman, reference was made to the amount distributed to him from the deposit made with the declaration of taking, whereupon the court gave the jury an explanation of what it was and instructed them to disregard it (R. 78-79, 221).

One of the Government's valuation experts was Woody Hunt, who was over the land at various times from 1939 to 1944, and appraised it, as of the date of taking, in 1947 (R. 212-215). Petitioners'

objection to his qualifications was overruled (R. 214).

Petitioners' offer of testimony of a witness at the first trial, as to what he paid for part of the land in 1917, was refused (R. 179-183).

When he instructed the jury, the judge told them that he considered prices paid before 1939 too remote, but that they should judge the weight to be given to more recent prices (R. 222). He also said that evidence of productivity of the land in earlier years should be given less weight than evidence of recent productivity, but that the jury were not bound by his opinions (R. 227).

The jury returned a verdict for $160,000 (R. 228), for which sum, together with $8,700 stipulated severance damages, the court entered judgment (R. 22-24). New trial was denied (R. 27). The court of appeals affirmed the judgment (R. 456-457) and denied a rehearing (R. 458-459).

ARGUMENT

1. The sole issue in this case is the amount which constitutes just compensation for the taking of petitioners' land. No question is presented as to the standards by which just compensation is determined under the Fifth Amendment. The alleged errors relate simply to rulings as to admissibility or effect of particular items of evidence. Although petitioners set forth five reasons for granting the writ (Pet. pp. 6-8), they actually assert one ground therefor, i. e., that the trial court had declined to

follow local law as to matters of procedure as it was bound to do under the conformity statute, 40 U. S. C. sec. 258 (see Br. 1-3). But, as petitioners recognize (Pet. p. 6), the decision of the court below did not rest upon a construction of that statute or upon a view that despite such statute, local law was not applicable. Rather, the court below simply concluded that the case "was well and fairly tried" (R. 456). There is, therefore, no conflict with decisions construing the conformity statute (cf. Pet. p. 7) and, as we shall show, there was no error in the particular rulings complained of.

2. The ruling of the trial judge limiting the number of valuation experts to four on each side was not an abuse of discretion and did not, as petitioners assert (Br. 3-7) conflict with any controlling local law. The Supreme Court of Oklahoma has held it not error to limit the number of witnesses on an issue of value. *Reynolds* v. *Reynolds,* 174 Okla. 443, 445. The earlier case of *Cope* v. *State,* 23 Okla. Cr. 161, relied on by petitioners, only disapproved an arbitrary limitation. The limitation in the present case was not arbitrary. It was imposed after a pre-trial inquiry as to what witnesses the parties wanted to produce, at which petitioners offered no explanation of why they needed more than four valuation experts (R. 29-30). Moreover, having made no offer of further proof as invited by the court (R. 41, 48), petitioners have

not shown that they were adversely affected by the ruling.

3. When reference was made to the withdrawal by petitioners of estimated just compensation deposited in court with the declaration of taking, the trial judge gave the jury an explanation of the nature of that procedure and instructed them to disregard it in fixing compensation (R. 78-79, 221). Petitioners assert that this episode presents a conflict with Oklahoma decisions which hold that an award by commissioners is not proper evidence of value in condemnation (Br. 7-12). No conflict appears; the deposit was not an award by commissioners, and the jury were not allowed to consider it, but were instructed to disregard it. There is no reason to presume that the jury disregarded that instruction, and no such presumption is required by the Oklahoma cases relied on by petitioners (Br. 9).

4. There was no error in admission or exclusion of evidence. Petitioners complain that admission in evidence of their personal income tax returns was error because they did not show segregated income from this property, and because income would not be proper evidence of value (Br. 12-15). However, any error in admission of this evidence was cured by the judge's instruction to the jury not to consider the returns except as evidence of the number of cattle on the land (R. 169-170). The

use of those tax returns and petitioners' personal property tax assessment declarations to show the number of cattle run and wintered on the land was not, as petitioners assert, improper impeachment because going only to a collateral matter (Br. 15, 21-23). Evidence introduced by one party in proof of its contentions is material rather than collateral, and can be impeached by the other party. *Ewing* v. *United States,* 135 F. 2d 633, 639-643 (App. D.C.), certiorari denied, 318 U.S. 776. The capacity of the land to support cattle was an element of its value—the main issue in the case. When petitioners testified in proof of that value how many cattle they had wintered on the land, that became a material matter and it was open to the United States to impeach their evidence regarding it. Petitioners' suggestion (Br. 22) that assessed valuations are not admissible evidence of value is irrelevant; the assessments were not offered or admitted as evidence of the value of the cattle assessed.

The evidence showed that comparable land values had increased about five per cent from 1939 to the time of the taking in 1944 (R. 202). The trial court did not abuse its discretion in permitting the jury to consider, with regard to the circumstances, prices paid in that period for parts of the land condemned (R. 222). The court's ruling does not conflict with that of *Thompson* v. *Boydstun,* 189 Okla. 530, relied on by petitioners

as establishing a contrary rule (Br. 15-18). That case merely held that it was not error to exclude prices paid on forced sale. The exclusion of evidence as to prices paid in 1917 (R. 179-183; Pet. Br. 19-21) was not an abuse of discretion; it was not inconsistent with the admission of more recent prices. The rule that where one party has been allowed to introduce evidence of a certain sort, the other can introduce evidence of the same sort (Pet. Br. 19-20) has no applicability where the latter evidence is plainly distinguishable as being more remote in time.

5. The Government's witness Woody Hunt had been on and around this land before and at about the time of the taking, although he did not make his appraisal of it until later. The trial court did not abuse its discretion in holding him qualified to testify. The case of *Healdton Oil & Gas Co.* v. *Regnier,* 170 Okla. 271, relied on by petitioners as conflicting, merely held that it was not an abuse of discretion to refuse to let a witness testify when he did not show sufficient knowledge of the land at the valuation date. The court here believed that the witness had shown sufficient familiarity as of that time. In permitting him to testify it did not abuse its discretion or conflict with any Oklahoma rule. No conflicting applicable rule is established by the cases of *Mary Jane Stevens Co.* v. *First National Building Co.,* 89 Utah 456,

or *United States* v. *13,255.53 Acres of Land*, 158 F. 2d 874 (C.C.A. 3), also relied on by petitioners (Br. 23-25).

6. The trial judge told the jury that less weight should be given to evidence of the productivity of the land at remote, as compared with recent, times (R. 227). Petitioners contend that this comment violated the rule that land is to be valued according to its best use, regardless of the use to which it is being presently put (Br. 25-29). That contention both overlooks petitioner's own testimony that he was putting the land to its best use (R. 76), and distorts the judge's statement, which was directed to the time when the use was made, rather than to its character. In any event, the judge also told the jury that they were free to disagree with his opinions (R. 227). Since there was no error in the judge's comment, petitioners have no basis for invoking the rule that error relating to substantial rights should be presumed to have been prejudicial (Br. 28-29).

CONCLUSION

The decision below is correct and involves no conflict of decision or question of general importance It is respectfully submitted that the petition should, therefore, be denied.

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